

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

HEARING ON MOTIONS

February 15, 2019

Before: John F. Anderson, U.S. Mag. Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, and Jeffrey M. Gould,
Counsel for the Plaintiffs

Thomas M. Buchanan and Jennifer A. Golinveaux,
Counsel for the Defendants

1 NOTE: The case is called to be heard at 10:04 a.m.
2 as follows:

3 THE CLERK: Sony Music Entertainment, et al. versus
4 Cox Communications, Inc., et al., civil action number
5 18-cv-950.

6 THE COURT: Okay, everyone will need to introduce
7 themselves and tell me who is going to argue the motion for
8 each side. Thank you.

9 MR. ZEBRAK: Good morning, Your Honor. Scott Zebrak,
10 counsel from plaintiffs. With me are my colleagues Matthew
11 Oppenheim and Jeffrey Gould. I will be arguing on behalf of
12 the plaintiffs.

13 THE COURT: All right.

14 MR. OPPENHEIM: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. BUCHANAN: Good morning, Your Honor. Thomas
17 Buchanan and Jennifer Golinveaux on behalf of the defendant
18 Cox.

19 Ms. Golinveaux will be arguing the subscriber by
20 subscriber financial information component of the motion to
21 compel, and I'll be arguing the other two regarding the third
22 party notices and the e-mails and communications.

23 THE COURT: Well, let me -- I'm just a little -- we
24 have one motion. And tag-teaming motions doesn't really seem
25 to be a very efficient way to do things.

1 I mean, I'll let you go ahead and do it today, but,
2 you know, when we have a motion, we're not going to be having
3 teams of lawyers arguing a single motion in the future.

4 So make plans to --

5 MR. BUCHANAN: Yes, Your Honor.

6 THE COURT: -- you know, have one person address what
7 we need to do so that we can just get it done, go through it
8 from beginning to end, and we don't have to do this sort of
9 stand up/sit down.

10 All right. So I have reviewed all the pleadings, all
11 the exhibits, and I just want to let you know I kind of
12 appreciate the opportunity to have the chance to read them all,
13 other than late at night the night before the motion.

14 I know sometimes things get tight, but I just want to
15 acknowledge that I do appreciate that. And it did give me a
16 little bit more of an ability to go over it and prepare it and
17 make sure that I'm understanding the issues that are involved.

18 But I will go ahead and give the plaintiff a chance
19 to make any arguments that it wants to make on the three
20 issues. And I have got some questions on -- certainly on issue
21 number two. But go ahead.

22 MR. ZEBRAK: Yes, Your Honor. I am happy to approach
23 this in whatever order that the Court would prefer. I would
24 like to let the Court know though that with two minor
25 exceptions, we have, just on the eve of walking in here, have

1 worked out a solution with two caveats for the third section of
2 the motion. I don't know if you want me to begin with that.

3 It has some spill-over to the first section as well
4 because there is an interrelatedness between the notice data
5 about specific subscribers cited in our -- in our notices and
6 the financial information about those subscribers. But --

7 THE COURT: Well, go ahead and tell me what it is --

8 MR. ZEBRAK: Sure.

9 THE COURT: -- that you all have worked out, and then
10 we will try and parse through what it means.

11 MR. ZEBRAK: Sure. Sure. So, Your Honor, there is a
12 screen shot on page 13 of our reply brief that contains the
13 document that -- well, excuse me. That's the -- that's the
14 beginning part of a -- of a ticket that shows that their CATS
15 system actually has summary level data about the subscribers in
16 our notices. And Cox has now agreed to provide us with that
17 summary level data for the -- Cox has identified about 58,000
18 subscribers implicated by our notices.

19 So with respect to the data fields it's going to
20 provide, it will give us the sorts of fields that Your Honor
21 sees here, including the Abuse Type Copy/Other, and then the
22 left-most column in yellow highlight is the Ticket Number, then
23 there is a date of the -- for that ticket. And then there are
24 some other fields, including the action that Cox took. So Cox
25 will give us all that.

1 And then, so the two areas where there is still
2 disagreement concern the time period for this data and whether
3 Cox excludes what Your Honor will see at the top where it says:
4 ICOMS ID. Whether it will exclude that or instead just give a
5 unique identifier that it sort of substitutes in place of that.

6 As we understand it, Cox internally has a concern
7 that that could constitute personally identifiable information.
8 The plaintiffs disagree with that.

9 While the parties earlier on were talking about
10 perhaps assigning a proxy number to identify each subscriber
11 implicated by our notices, what became apparent to plaintiffs
12 during the course of the briefing on this and Cox's
13 declarations is that its CATS system, as Your Honor sees here,
14 has this reference to the financial data that we want about the
15 subscribers.

16 And when we see other e-mail in the case, it's
17 possible e-mail might reference an ICOMS ID number, and that
18 would allow us to know if e-mail talks about this subscriber
19 and then in working with Cox's witnesses it's not going to know
20 whatever unique identifier Cox's counsel puts on this data now,
21 but it will know an ICOMS ID number.

22 So that's the first issue. We just think it's far
23 simpler and more practical in the conduct of the litigation to
24 retain the ICOMS ID number.

25 And the second issue on this concerns the -- just the

1 time period. This was a period of time in which Cox was
2 receiving lots of notices. And, you know, this case is about
3 Cox's continued provision of service to subscribers it knew was
4 engaging in infringement.

5 So what the plaintiffs want to be able to do is
6 understand and present to the jury what Cox knew about those
7 subscribers and the moneys it received from those subscribers.
8 And so, if -- again, not for all the notices it got, but just
9 for notices about the subscribers implicated by our notices,
10 you know, if Cox got an infringement notice from some other
11 third party saying, you know, subscriber John Smith was
12 infringing and, you know, Cox is already on notice about that
13 bad subscriber, we would like to tell that more complete story.

14 THE COURT: Why would you need two years of pre-claim
15 information? I mean, that's what you've been asking for,
16 right?

17 MR. ZEBRAK: Yes, Your Honor.

18 THE COURT: You are asking for 2011 --

19 MR. ZEBRAK: Yes, sir.

20 THE COURT: -- 2012, 2013, and 2014?

21 MR. ZEBRAK: Yes, Your Honor.

22 THE COURT: So why would something two years before
23 the notice period be appropriate?

24 MR. ZEBRAK: Well, just expanding somewhat on -- on
25 what I was just alluding to --

1 THE COURT: Well, I can see one year, but I'm trying
2 to figure out --

3 MR. ZEBRAK: Sure --

4 THE COURT: -- why you went two years out.

5 MR. ZEBRAK: Yes, Your Honor.

6 THE COURT: One year gives you some history.

7 MR. ZEBRAK: Yes, Your Honor.

8 THE COURT: Two, if there was a notice two years
9 earlier about, you know, a possible copyright infringement and
10 there hadn't been anything for the next two years --

11 MR. ZEBRAK: Yeah, yeah.

12 THE COURT: That doesn't seem to be as strong of an
13 indication that they should have taken immediate action because
14 it would have been a one-off thing.

15 MR. ZEBRAK: Yes, Your Honor I appreciate the
16 question. I mean, to be perfectly frank, there is probable
17 multiple scenarios at play. There may be a scenario where
18 subscribers implicated in our notices were, you know, routinely
19 implicated by notices from others in 2011 and 2012. For
20 others, it may just be 2012.

21 And our view though is that Cox's behavior is that
22 much more egregious for purposes of what needs to be deterred
23 and for willfulness, that, you know, the greater its knowledge
24 about a subscriber's bad activities. And so, I think there is
25 a legitimate ground for it.

1 And if there was some burden -- you know, Cox's
2 declarations go on and on about the burden involved in going
3 into the tickets and manually excluding information. None of
4 that is an issue here. It is an automated data pull. There is
5 really, once it runs a script for that, it's no additional
6 burden.

7 And our point is just going to be if thousands of
8 these subscribers were, you know, implicated by notice after
9 notice, it's important.

10 THE COURT: All right. Okay. So who is going to
11 deal with those issues? We will go ahead and take care of the
12 third category --

13 MR. ZEBRAK: Yes, Your Honor.

14 THE COURT: And then I guess we'll do this category
15 by category.

16 MR. BUCHANAN: Good morning, Your Honor. And with
17 regard to the date, we compromised. They asked for 2011 to
18 2014. We agreed to go to 2012. We think that is plenty of
19 additional time for them to show what they want to attempt to
20 show. And we think that's a fair compromise.

21 The Court has in a number of other cases with regard
22 to discovery requests has balanced the two competing interests
23 by going back a year or so. And that's what we have done here,
24 to try to follow the Court's lead on that.

25 So we think that's reasonable. And it is burdensome,

1 there is a lot of work involved. And we don't think it's
2 relevant. And so, we think that's a fair compromise.

3 In terms of the unique number, the ICOMS number, they
4 suggest now, even though we've had discussions before about
5 using a separate number to protect the identity of the
6 customers --

7 THE COURT: Well, what -- giving them the ICOMS
8 number doesn't give anybody the identity of anybody. I mean,
9 that is a number that if I looked at, I would have no idea who
10 that relates to, right?

11 MR. BUCHANAN: Correct, on its face. But our client
12 tells us that that number can be utilized to track the identity
13 of the customer, and that's what --

14 THE COURT: Well, an IP address can be used to do
15 that too, right?

16 MR. BUCHANAN: Not as easily according to our client.
17 But that's what they've advised us, Your Honor. That's the
18 only reason.

19 It's not to frustrate the effort of the plaintiffs.
20 It's just something we believe is necessary to protect our
21 customers' identity or to make it as safe as possible.

22 And we don't think it's really relevant because we
23 don't think these ICOMS numbers are floating around in a lot of
24 e-mails by which they have got to connect the e-mails to this.

25 I mean, the whole issue here is really they wanted

1 numbers. They want to show that they had 58,000 subscribers to
2 whom they sent notices about and 168,000 notices. Now they
3 want more notices to try to show they all equate with
4 infringement, and they put us on notice, to enhance their
5 damages.

6 So this number is not really relevant. It's just
7 that they want to create a chart with all these numbers.

8 THE COURT: Well, it's more work for you to have to
9 do something to replace that number; is that right?

10 MR. BUCHANAN: I don't think it is because we're
11 going to create a different type of formatted screen shot. And
12 so, it would just leave that off.

13 Again, we would have no problem with giving it if we
14 didn't think it was an issue and if we thought it was really
15 relevant. I don't see this notion that this number is going to
16 connect them to all these e-mails and they will be able to
17 depose people about Joe Jones who infringed in 2013 and 2014
18 and '12 on their copyrights and then on some other copyrights.
19 I just don't think there is e-mails out there that are
20 like that. So --

21 THE COURT: All right. Let me -- what is the purpose
22 of you needing to have the ICOMS number as opposed to just some
23 unique identifier that you know that, you know, that relates to
24 this issue with this IP address, or whatever?

25 MR. ZEBRAK: Yes, Your Honor. I would like to answer

1 that, and also respond to a couple of other things very
2 briefly.

3 So I think the starting point should be on Cox to
4 justify why it needs to change the number. From our
5 perspective, the reason we want the number is that's how it's
6 records exist in the normal course. E-mail May cite to it.

7 And more importantly, when we work with witnesses in
8 depositions, they're not going to understand some unique number
9 that Winston & Strawn assigns to this. They will understand --
10 they will understand an ICOMS field.

11 And when we put a witness on the stand at trial,
12 we're going to walk through the interrelatedness of the revenue
13 information from its financial database with the notice data
14 from its CATS database.

15 And the idea that somehow this could be used to
16 identify a subscriber is really just preposterous. It's an
17 internal database ID number within Cox. It's not the
18 customer's account number on their billing statement. This is
19 just an internal unique serial number they have ascribed to a
20 subscriber for purposes of cross-referencing things internally.

21 So -- and there is no declaration in the Court about
22 risks of disclosure of someone's personal identity from this.

23 THE COURT: Well, no, there is some information about
24 their being concerned about the personal identifying
25 information being included. But I understand your argument.

1 MR. ZEBRAK: Yes, Your Honor. And that, of course,
2 that information though is about what could be subsumed within
3 the tickets. It has nothing to do with the personal nature of
4 an ICOMS ID.

5 And Cox's counsel just mentioned that there is some
6 burden involved here. There is no articulated burden in
7 producing a summary level information, nor any burden involved
8 in going back to 2011 versus '12.

9 And as Your Honor seized on already, their changing
10 normal course by assigning a proxy number to it that, you
11 know -- that only creates more work. So ...

12 THE COURT: All right. Okay. For item number 3, I
13 am going to go ahead --

14 MR. ZEBRAK: Oh. And, Your Honor, the only other
15 thing I would like to say on this, if we could, is at the last
16 hearing plaintiffs were required by Court order to produce
17 historical revenue data on its tracks at issue in the case
18 going back to 2011.

19 So there seems to be sort of a parallel that we would
20 like to keep consistent.

21 THE COURT: Well, revenue data and complaints are
22 apples and oranges.

23 MR. ZEBRAK: Yes, Your Honor.

24 THE COURT: Okay. Anything else?

25 MR. ZEBRAK: No, Your Honor.

1 THE COURT: All right. On item number 3, I'm going
2 to require that they produce the information with the ICOMS ID.
3 And that the time period will be 2012 through 2014.

4 Okay. So that takes care of item number 3.

5 Do you want to go 1 or 2 next? Which --

6 MR. ZEBRAK: Yes, Your Honor.

7 THE COURT: Let's do the revenue one.

8 MR. ZEBRAK: Yes, Your Honor. So as I mentioned a
9 little while ago, the case, of course, is about Cox's continued
10 provision of service to subscribers it knew were engaged in
11 infringement. And what we want to be able to do is to
12 correlate what Cox knew about those subscribers' infringement
13 along with Cox's receipt of revenues from those infringers.

14 And here Cox has -- you know, it's unclear, quite
15 frankly, put in declarations that we think -- you know, the
16 purpose of a declaration is, of course, to clarify and put the
17 parties and the Court in a position to resolve the dispute. We
18 think that these declarations were more designed to just oppose
19 the discovery rather than clarify what they have and how they
20 have it.

21 But whether they call it revenue information or
22 billing information, you know, Cox knows what its subscribers
23 paid to it over time.

24 THE COURT: Well, it knows what it billed, and at
25 least it is indicating that it can track or it is contained in

1 the ICOMS system what was billed. And whether they don't
2 collect on their bills or not, I don't know. But, you know,
3 apparently they are trying to mistake a distinction as to what
4 was billed and what are revenues.

5 MR. ZEBRAK: Yes, Your Honor. But if I could expound
6 on that slightly because I think it's a little more refined
7 than that based on how they briefed it.

8 So on the one hand they say, we don't track or
9 maintain revenue information in this ICOMS database. At the
10 same time they say, I don't have the exact words in front of
11 me, but what we have here, we don't maintain complete revenue
12 information. And that database lacks info next for accurately
13 calculating revenue.

14 THE COURT: Does it make any real difference to you
15 whether it's billing information or revenue information? We're
16 not getting down to, you know, nickels and dimes here.

17 MR. ZEBRAK: Of course, Your Honor. Of course, Your
18 Honor.

19 THE COURT: And if somebody didn't pay their bill one
20 month and they paid it the next month, and they maybe had to
21 have an interest charge or something --

22 MR. ZEBRAK: Yes, Your Honor, right.

23 THE COURT: This is not going to get into the
24 granular nature of those kinds of things.

25 MR. ZEBRAK: Right. Right. Well, come at trial they

1 no doubt will attack us for our experts and our use with their
2 witnesses. And when we try and calculate the sum total of what
3 Cox received from these subscribers that it knew were engaged
4 in infringement, it no doubt is going to try to beat us up
5 saying it doesn't accurately reflect what it received.

6 But on the billing information, it does say that the
7 ledger side of that system includes not just what it billed,
8 but also information about accounts receivable and credits.

9 So it's unclear to us the nomenclature they're using
10 about -- about revenue versus billing. And if they want to
11 produce billing information instead of revenue information, if
12 they'll -- if they'll stipulate right now that they won't at a
13 trial say that what they actually received is less than what
14 the system reflects on billing, that's fine with us.

15 You know, but the bottom line is, it knows who these
16 subscribers are. It has information on how it benefitted from
17 these subscribers financially.

18 And, you know, the information, Cox says it's only of
19 marginal relevance. Nothing could be further from the truth
20 than that. I mean, this goes squarely at a number of core
21 issues in the case.

22 You know, there is a difference between us and Cox's
23 counsel in our views of how to prove the financial interest
24 prong of vicarious infringement. We think when it decides to
25 keep a subscriber rather than terminating it, obviously all

1 that ill-gotten revenue after that is a direct financial
2 benefit.

3 But without even delving into that issue, which is a
4 little more legally dense, Cox has no argument against why the
5 information we seek isn't super-strongly relevant to the
6 statutory damages issues of Cox's profits as well as Cox's --
7 you know, the need to deter Cox.

8 And we need to see not just the aggregate Cox got
9 from these subscribers it knew was infringement, but then
10 correlate it against its decisions not to terminate them.
11 That's incredibly powerful evidence, and it's why Cox really
12 doesn't -- doesn't want to produce that.

13 And quite frankly, it cites -- you know, it goes on
14 in its declarations about the costs of doing it manually. But
15 we're not interested in them doing this manually. Just as
16 plaintiffs are required to do in response to a number of
17 discovery requests, we're running reports to figure out how to
18 pull information out. And in the context of this case and
19 these issues, \$15,000 is something that the parties are
20 routinely absorbing.

21 So, you know, again, we just think it's very
22 relevant. It's all in one database, and we would like it
23 produced. And we would like them, if they are not going to
24 produce revenue information, which we don't think they have
25 articulated that they lack, we would like them to produce at

1 least this billing information and be held to -- be held to
2 the proposition of that's what it received in revenue.

3 THE COURT: Okay.

4 MR. ZEBRAK: Thank you, Your Honor.

5 THE COURT: Thank you.

6 First help me understand the difference between the
7 billing and the revenue argument.

8 MS. GOLINVEAUX: Yes, Your Honor. So ICOMS is Cox's
9 subscriber management system. The records that the plaintiffs
10 are seeking, this is not the kind of report that Cox could run.
11 It doesn't track revenue on a per subscriber basis. So it
12 doesn't have a business need to run that type of report in the
13 ordinary course.

14 So as is described in the Jarchow declaration, this
15 would require, to do this in an automated way -- automated way,
16 hiring an outside engineer to come in and write code to create
17 this special report they are seeking --

18 THE COURT: I mean, you have got the information,
19 it's just how are you going to access it. Okay.

20 So what I'm trying to find out is, you know, what's
21 the word game between billing and revenue? I mean, if I called
22 Cox up right now and if I had a Cox account and I gave them my
23 account number, they could pull up something that had, I
24 assume, my billing information that would include what was I
25 billed and whether those bills were paid, right?

1 MS. GOLINVEAUX: Your Honor, there is, as described
2 in the declaration, there is the ledger section of ICOMS.

3 THE COURT: Right.

4 MS. GOLINVEAUX: And it does contain, in addition to
5 the amount billed, certain account receivable information, like
6 debits and credits.

7 And my understanding is that to create the report
8 that processed all that in a meaningful way to show what was
9 actually paid versus what was billed, is a more complicated
10 process and more involved process.

11 THE COURT: Is there any generic information as to
12 Cox receives 98 percent of its billings? I mean, if this is a
13 situation where you're going to try and make some, you know,
14 cute argument that they were only billed and that doesn't
15 indicate what we actually got as revenues, I want them to have
16 some generic information they can use to say, okay, they only
17 gave us the billing information, but historically Cox, you
18 know, gets money in the door for 98 percent of its billings, or
19 90 percent of its billings, or whatever it actually -- the
20 realization rate for its billings for subscribers.

21 Is there that kind of information available?

22 MS. GOLINVEAUX: For the time period at issue, Your
23 Honor, I am just not sure if they have that, that information
24 about percentages of dollars they collect off of the billing
25 information. Off the bills, the amounts billed.

1 THE COURT: Well, that's the kind of information that
2 you would think would routinely be looked at and analyzed by
3 the business people within the organization, wouldn't it?

4 MS. GOLINVEAUX: It certainly may, Your Honor.

5 THE COURT: Okay. All right. So the billing
6 information, help me understand what the situation is with
7 that. You have to pay somebody \$15,000 to prepare some type of
8 script or program or program to run to get this information
9 from the database that you have maintained. Okay?

10 MS. GOLINVEAUX: That's correct, Your Honor. And we
11 think that -- counsel talked about the relevance of this
12 information. We think that they are just wrong about the
13 vicarious liability issue. Vicarious liability requires right,
14 ability to control, and a direct financial benefit.

15 There is no dispute that Cox bills for its services,
16 its Internet service. The amount it billed to each of these
17 58,000 subscribers is not relevant to the direct financial
18 benefit prong of vicarious.

19 And in light of the marginal relevance and the fact
20 that Cox cannot create these reports in the ordinary course and
21 is going to have to hire an engineer to go in and write a
22 script to extract it, we think it's not appropriate.

23 THE COURT: Okay. What about the time period, your
24 argument on that.

25 MS. GOLINVEAUX: Your Honor, they're asking for the

1 information for more than eight years, from 2011 to the
2 present. If Your Honor is inclined to order it, we think that
3 the claims period is the relevant time period. They're saying
4 it's relevant to damages. What Cox billed these subscribers
5 before or after their claims period can't possibly be relevant
6 to statutory damages or actual damages.

7 THE COURT: Well, why wouldn't -- if in fact you
8 should have terminated a customer in let's say January of 2014
9 based on, you know, 13 or 14 or 15 different complaints. And,
10 you know, you decided that, you know, we need to keep every
11 customer. And, you know, that customer is continuing to pay
12 Cox money now, why wouldn't that, to some extent, come into
13 play as to, you know, it was important for you not to terminate
14 this customer because you wanted that revenue stream going in
15 the future?

16 MS. GOLINVEAUX: Well, Your Honor, that can't
17 possibly be relevant to damages. They can't seek -- they can't
18 show --

19 THE COURT: Why wouldn't it go to willfulness? My
20 willful act so that I could get this revenue stream for four or
21 five more years, or whatever the standard industry rate is
22 that, you know, somebody doesn't change their Internet service
23 or these kinds of providers, why doesn't that come into play as
24 to willfulness?

25 MS. GOLINVEAUX: Because, Your Honor the standard for

1 willfulness is whether Cox was aware that its actions with
2 respect to the plaintiffs' works constituted infringement. And
3 whether it was receiving revenue from these subscribers at
4 issue years before or years after the claims period is not
5 relevant to that inquiry.

6 THE COURT: Okay. The script that would be written
7 to do this, would it produce -- I mean, you made some comment
8 about you only have this monthly. Would this be monthly
9 information, or quarterly information, or what's the process
10 that you would anticipate that information being generated?

11 MS. GOLINVEAUX: If the -- if we're writing a script,
12 I think it could be either monthly or annually because the
13 script could roll it up by year.

14 THE COURT: Okay. All right. Let me hear from the
15 plaintiff about the time period information and whether yearly
16 or -- I assume you would want it -- you want it quarterly and
17 yearly. I don't -- I am not sure why if you got it quarterly,
18 why you would need it to be quarterly and yearly.

19 But I assume you would want it on a monthly basis as
20 opposed to a yearly basis; is that right?

21 MR. ZEBRAK: Yes, Your Honor. Given that it's just
22 pulling it out of a database, it's -- it will be more useful at
23 a trial for us to be able to slice and dice the data different
24 ways. And if it just wants to give us a report giving --
25 giving the data monthly, that's absolutely fine with us.

1 Your Honor, there are several statements I would like
2 to respond to, but if Your Honor is already inclined to find
3 that the information is relevant, I won't need to speak to
4 that.

5 THE COURT: Well, the time period I do need to hear
6 you.

7 MR. ZEBRAK: Yes, Your Honor.

8 THE COURT: And I can understand why a brief,
9 historical time period might be appropriate, just to know if,
10 you know, whether this was a new big customer or a long-term
11 big customer, whatever.

12 MR. ZEBRAK: Yes, Your Honor.

13 THE COURT: But I'm still a little unsure as to how
14 significant the amount is to the present as opposed to whether
15 that customer continued for a year, or two years, or something
16 like that.

17 MR. ZEBRAK: Yes.

18 THE COURT: So why is the information going to, you
19 know, the present time significant?

20 MR. ZEBRAK: Yes, Your Honor. So to be clear, there
21 are two issues on the time period. There is the claims period,
22 and then there is the before and the after.

23 THE COURT: Right, right.

24 MR. ZEBRAK: But I will begin with the after, as Your
25 Honor asked.

1 THE COURT: Okay.

2 MR. ZEBRAK: So in terms of Cox's profits, and sort
3 of ill-gotten gains from continuing to provide service to these
4 subscribers it knew was engaging in infringement, obviously
5 however much money it kept receiving, you know, those
6 ill-gotten gains didn't stop at the end of our claims period.

7 You know, had it terminated that subscriber -- I
8 mean, Cox is free to make whatever arguments it wants to make
9 at a trial about our use of the revenue information being too
10 expansive or not. That really is a question for trial.

11 But if, you know, if Cox didn't terminate a customer,
12 and then that customer continued for another two years, or
13 continued to the present day, that's all ill-gotten revenue
14 that Cox shouldn't have received, and speaks to its profits, as
15 well as the need to deter Cox --

16 THE COURT: Well, revenue and profits are two
17 different things.

18 MR. ZEBRAK: Yes, Your Honor.

19 THE COURT: And, you know -- and I'm -- well, keep
20 going.

21 MR. ZEBRAK: Well -- no, sure. And it's certainly
22 entitled to come in and try and say, here is what we actually
23 made on these subscribers, not the gross receipts.

24 But even putting aside whether -- how you prove
25 profits and the interaction between offsetting revenue with

1 costs, just the need to deter Cox, it's incredibly powerful
2 if -- you know, it shows -- you know, what Cox wants to do is
3 just produce the raw aggregate amount of money it made from
4 certain division of its business. And then come at trial it's
5 going to say, that's overbroad because it includes lots of
6 subscribers who never infringed.

7 And what we want to do is just have the information
8 showing how Cox received moneys from these subscribers it knew
9 was engaging in infringement but chose to keep them.

10 And so, you know, we just think -- you know, going
11 back earlier than the claims period, given Your Honor's ruling
12 on the notice data being just 2012 rather than 2011, having it
13 coterminous with that, you know, makes sense in terms of 2012
14 rather than going back to '11 because we can then see, okay,
15 here is a subscriber, John Smith, here is what Cox was getting.
16 It knew he was engaged in infringement, but yet Cox kept
17 providing service. And look at how the revenues kept growing,
18 maybe through to today.

19 And so, our experts, you know, might produce a report
20 that calculates that.

21 I mean, the reason why they're fighting this so hard
22 is because it's incredibly probative. And there is no
23 additional burden -- you know, they're running a report to pull
24 data from a database, and once they're doing that, I mean, I
25 think the relevance is clear.

1 THE COURT: Well, a monthly report for 58,000
2 customers for additional years, you know, takes computer time
3 to do that. I am not sure how much computer time.

4 MR. ZEBRAK: Yeah.

5 THE COURT: But, I mean, it generates a lot of
6 information that then -- does that really bear any significant
7 benefit to the parties in having what was -- you know, what
8 this customer was billed in 2017 when you're talking about an
9 infringement period that ended in 2014.

10 MR. ZEBRAK: Yeah. I mean, I just think, you know,
11 when a -- look, if a company terminates my account with them, I
12 am less likely to probably sign up with them again.

13 And the bottom line is, this is all revenue Cox
14 wouldn't receive. It can make its arguments at trial, it can
15 have its experts make its argument, but all this revenue -- I
16 mean, what Cox wants to do is to say, look, this was a limited
17 period of bad behavior at our company. And it wants to try and
18 cabin everything into just this claim period.

19 And it wants to, you know, just produce its -- again,
20 its overall data and not allow us to focus on the moneys it
21 received from these bad subscribers. And in the context of
22 this case, running a report on just -- you know, revenues from
23 these subscribers, really just isn't -- isn't that demanding.

24 THE COURT: Okay. All right. Well, I think I
25 understand what the issues are there.

1 I do think -- you know, I can appreciate the
2 defendants' argument that they don't agree this information is
3 relevant. And whether it makes its way into the trial of this
4 case will be something for Judge O'Grady to decide. But I do
5 think at this point in time it is discoverable information.

6 And it is discoverable information that is available
7 to Cox. The method that they maintain it, if it makes it
8 difficult for them to gather that information, that still
9 doesn't make it not relevant information.

10 And the idea that it's going to cost \$15,000 doesn't
11 overwhelm me, to be honest with you. Given the nature of this
12 case and the amount that is being spent to litigate this case,
13 that doesn't really impact me on the proportionality argument.
14 That, you know, that kind of investment to get relevant
15 information to produce in this case doesn't tip the scales.

16 So I am going to require that revenue information
17 attributable -- well, that billing information, yes,
18 attributable to each subscriber for the time period from 2012
19 through 2016. That gives you one year early during the period,
20 a five-year period. I think that gives you at least a point
21 for your experts to look at to see, to generate, you know -- I
22 assume your experts are going to also then, you know, not only
23 try to do what they have gotten to date, but what will be going
24 in the future. And this is -- that's enough information for
25 them to deal with.

1 It needs to be done on a monthly basis. So that
2 needs to be generated on a monthly basis. So it will be from
3 -- a monthly basis from 2012 to 2016.

4 I also want you to investigate and find out whether
5 there is available information concerning the realization rates
6 on billing information for that time period from 2012 through
7 2016.

8 So that, you know, we don't get into this, you know,
9 that was only what was billed, it wasn't really what was
10 received. That there can be some general correlation as to
11 billing and actual receipts from the company since you've
12 indicated or represented to the Court that the revenue
13 information is much more difficult to obtain. Okay.

14 All right, issue 2. You need to help me understand
15 what it is really is you're asking for on this. Because, you
16 know, if we're talking about every communication dealing with
17 every infringement, that's not going to win any argument.

18 MR. ZEBRAK: Yes, sir.

19 THE COURT: And so, I mean, it's a little unclear to
20 me -- and, you know, it's difficult to order something that's
21 unclear because I don't want to put the other side in a
22 position of coming back and not knowing what it is I'm
23 requiring them to do. So that you come back and say, they
24 didn't do what you told them to do, and we have to come back in
25 and say, I interpreted it as this, I interpreted it as that.

1 I mean, your motion talks about e-mails and -- let me
2 make sure I have got the exact -- e-mails and communication
3 concerning Cox's responses to handling of and attitude towards
4 infringement notices.

5 You know, responses to infringement notices, if you
6 read that literally, that would mean every response relating to
7 every notice, infringement notice that they got.

8 So I'm trying to figure out a way -- and I understand
9 your concerns.

10 MR. ZEBRAK: Yes, Your Honor.

11 THE COURT: The idea that, you know, the way that
12 they have parsed their response, some of the documents that we
13 are all very familiar with probably wouldn't fall within that,
14 and I think need to be produced.

15 MR. ZEBRAK: Yes, Your Honor.

16 THE COURT: So how do we get to that?

17 MR. ZEBRAK: Right. I -- quite frankly, we knew this
18 would be an issue that would come up at the hearing.

19 So the concern that Your Honor has raised is actually
20 already -- well, let me take a step back.

21 Obviously, Cox knows its documents better than we do.
22 You know, it knows how it's going about searching for things.
23 I mean, it's not speaking with us about it. It's not telling
24 us what search terms it's willing to use or not use.

25 What it's doing is -- I mean, to date Cox has not

1 produced -- I mean, to date in this case they have produced the
2 BMG trial exhibits, the fact witness depositions, a good part
3 of plaintiffs' infringement notices, and certain documents
4 regarding the technical functioning of CATS. No e-mails at all
5 yet.

6 And with respect to these requests, Cox has already
7 said it will provide documents. It hasn't just flat out
8 objected. But what it's done is -- so however it's planning to
9 go about searching for those things, whether it's already
10 subsumed within what they collected and produced in BMG, or
11 whether it's some additional searching, we don't know, but
12 they've already said, we will produce documents.

13 So what they've done though is they have put this
14 artificial limitation on it that is really designed to exclude
15 all the good stuff, right, because it's unreasonable to expect
16 that the documents of the type that Your Honor alluded to are
17 going to mention plaintiffs or plaintiffs' works.

18 And it's likewise not just cabining our claims --

19 THE COURT: Well, they may or may not. I don't know.

20 MR. ZEBRAK: Right, but --

21 THE COURT: Some of these e-mails may have been --

22 MR. ZEBRAK: Right.

23 THE COURT: There may be similar e-mails that relate
24 to specific infringement notices that were sent on behalf of
25 your clients.

1 MR. ZEBRAK: Entirely possible. But what it's done
2 is -- I mean, look, those types of e-mails, Cox can't seriously
3 argue lack relevance. Right? If they have an e-mail that
4 says: F the DMCA. Or: Hee-hee, let's not terminate these
5 subscribers because we care about the revenue. That's all
6 responsive.

7 But this -- and however they are going about planning
8 a search for it, again, it's in a black box to us, but they're
9 willing to do it. So what we want them to do is proceed with
10 their search, but just have the Court order that it remove this
11 artificial limitation of -- that it must include plaintiffs,
12 plaintiffs' works, or the claim period.

13 Or to the extent that would impact how it goes about
14 searching for these things, we are happy to have a discussion
15 about it. But we have asked 16 different ways and 16 different
16 times to have a discussion about search terms.

17 So what it wants to do is not work with us to narrow
18 it, and at the same time just not produce everything and
19 exclude these very relevant documents from the case.

20 I can explain why they're relevant, but I think the
21 Court already understands that.

22 THE COURT: No, I understand that part.

23 MR. ZEBRAK: And the arguments that it's making here
24 to try to exclude it are the precise ones that Judge O'Grady
25 addressed --

1 THE COURT: Well, there is a little bit of argument
2 on that, but I --

3 MR. ZEBRAK: Right. Okay.

4 THE COURT: But I understand your position on that.

5 MR. ZEBRAK: Yes, Your Honor. So, you know, on our
6 end, we know that there are these broad swaths of relevant
7 documents. And what Cox is in effect doing is saying, I'm not
8 going to search for them. I will only search for these things.
9 And I won't tell you how I'm searching for it.

10 And we're just asking for them to -- you know,
11 clearly we don't need every communication they have ever had
12 about the DMCA. But we can work them for some search terms to
13 try and get at this where Cox could be transparent with us
14 about how it's intending to go about it.

15 But if they have e-mails talking about let's not
16 terminate people to get revenue, it could come up with search
17 terms like -- with words like "terminate" and "lose money."
18 And we could come up with terms like this.

19 But, you know, where we are is we're struggling with
20 the fact that we know that there is these broad swaths of
21 documents that right now we're not going to get unless they
22 happen to have been a BMG trial exhibit, deposition exhibit, or
23 somehow mentioned plaintiffs or plaintiffs' works. And we
24 think that that's just sort of gamesmanship designed to exclude
25 these things.

1 I mean, if Cox was really trying to let us receive
2 these responsive documents, it would have worked with us on
3 search terms.

4 So I don't want to keep repeating myself.

5 THE COURT: Yes, I understand your position.

6 MR. ZEBRAK: Thank you, Your Honor.

7 THE COURT: Thank you. Okay.

8 MR. BUCHANAN: Your Honor, as you know, the
9 plaintiffs asked for all notices of infringement by any third
10 party previously, and the Court rejected that. Their argument
11 there was, well, they are relevant, they were sought in the BMG
12 cause, we should get them. And the Court said, it's
13 non-proportional and it's just not that relevant, you have to
14 narrow it.

15 And so, they did narrow it with their third request
16 here, where they ask for information about -- subscriber
17 information about the same subscribers as they have alleged
18 infringe their copyrights.

19 But now they have come back with this request that
20 we're talking about now and asked for even more information.
21 Instead of just asking for the notice of infringement, now
22 they're saying all e-mail correspondence, all communications
23 any way touching on those infringements.

24 So basically they're really asking for the
25 infringement notices as well because they're going to be

1 discussing those in all these e-mails.

2 So every single subscriber who got a warning about an
3 infringement, you know, all the discussion, e-mail back and
4 forth about that with that person, would have to be produced.
5 And that person may well have said, okay, it was my kid, I
6 stopped, and they want all that information. It's an enormous
7 amount of information.

8 So if the infringement notices shouldn't be produced,
9 why would all the e-mails and correspondence about those same
10 infringement notices have to be produced?

11 It's -- they didn't narrow it. They talk about
12 search terms. They haven't offered any search terms to deal
13 with that. They have stuck with that.

14 So even though the Court already ruled and said,
15 look, that's too much, it's non-proportional, you are plowing
16 the ground from BMG, you need to narrow it. So they narrowed
17 it with a request for information about infringers who are the
18 same people, subscribers, as alleged in their -- in their case.
19 We are willing to give that information.

20 But now they're asking for all these -- and it's on
21 them. That's what they have put forward. They have come in
22 and said, we want this information, we demand this information.

23 THE COURT: Well, if -- if your client has documents
24 in its possession that says, we're going to take the position
25 on a BMG complaint or any kind of -- you know, this person

1 complained through the BMG system, and we have got 13 different
2 complaints to them, and we're going to say, to heck with it, we
3 want this customer because, you know, it's a good customer.
4 And to heck with, you know, the law. Why is -- and that's
5 their policy. Why shouldn't that document be produced?

6 MR. BUCHANAN: So, in effect, all those documents
7 have been produced because they were part of the BMG case, and
8 they have been given to them. So they have cited them all in
9 their brief.

10 THE COURT: Right.

11 MR. BUCHANAN: They said, look at this, look at this.

12 THE COURT: Right.

13 MR. BUCHANAN: So they are saying somehow there is
14 some more out there.

15 THE COURT: Well, there may be. I mean, that's --
16 that's what they don't know. And the way that you have phrased
17 your response to this certainly seems like you are trying to
18 not go back and produce that kind of information if there is
19 information within your client's possession concerning its
20 approach to handling these kinds of infringement notices in
21 general, not just a particular infringement notice from the
22 plaintiff here, and that in dealing with these situations we
23 need to do X or we need to do Y or we need terminate him today
24 invite him to come back tomorrow, that's very significant
25 information.

1 MR. BUCHANAN: And we are producing that with regard
2 to the complaints at issue in this case with regard to their
3 clients. So the names --

4 THE COURT: But if there is a policy that you're
5 going to deal with everybody and there are communications
6 relating to that policy, whether it's formal or informal, or,
7 you know, this is the way that we should be handling these
8 kinds of situations, and that kind of situation is not one of
9 the plaintiffs in this case, that's relevant information.

10 MR. BUCHANAN: So we have agreed to produce all
11 formal and informal policies that were in place during the time
12 period in question whether that was in an e-mail discussion or
13 whether that was actually in a stated policy. They have all
14 that.

15 THE COURT: Well, what do you mean by "informal
16 policy"?

17 MR. BUCHANAN: So if somebody --

18 THE COURT: Will you acknowledge today that an
19 informal policy is, we take into consideration revenue before
20 we terminate a customer?

21 MR. BUCHANAN: I think that -- well, they already
22 have that.

23 THE COURT: Well, I mean, that is a document. But if
24 you're saying, I'm going to produce formal and informal
25 policies, unless you are willing to admit that it was an

1 informal policy of the organization to take into consideration
2 revenue before we terminated them, then that kind of a document
3 wouldn't be responsive to the way that you're saying you're
4 going to be doing your search. And that kind of information
5 really is significant and needs to be produced.

6 So that's why I'm concerned about the way that you're
7 parsing this information, is I don't know what you mean by
8 "informally policy."

9 MR. BUCHANAN: So, Your Honor, what -- so we're
10 living in -- right now we're in a hypothetical world. That
11 somehow there might be an e-mail out there where somebody at
12 some point in time said to somebody else about a particular
13 infringer, hey, we ought to keep this guy on board because he
14 is paying us \$400 a month. They have that.

15 All those e-mails that they're referencing, that they
16 have cited, they have all of those. So the idea that there
17 might be one or two --

18 THE COURT: They have what they have.

19 MR. BUCHANAN: Right. So let's assume that there is
20 one or two out there. And we search millions of e-mails and we
21 find one or two more and where there is these same references
22 by Zabek, or Sikes, where they make some reference about
23 somebody, hey, keep them on board. How is that adding anything
24 considering the proportionality of the search and the cost
25 versus what they have?

1 They have our policies and procedures, you know, that
2 the first person isn't counted. That, you know, you go to 13
3 steps, there is warnings. They have all that. And they have
4 all these other e-mails they have cited with the references and
5 the obscenities, and they are going to put all those forward
6 and they are going to say, look, all they cared about was
7 money, that's all they cared about, they are a greedy
8 corporation. And they have those e-mails.

9 Look at these where they talk about keeping people on
10 board. They have that.

11 So the idea that we might find one or two or three
12 more, how is that proportional with regard to the cost of the
13 search?

14 THE COURT: What if you found 10,000 were, wouldn't
15 be that significant?

16 MR. BUCHANAN: That would have all been uncovered in
17 the BMG case.

18 THE COURT: How do they know that?

19 MR. BUCHANAN: Well, because they can look and see
20 what the request was and what the production was in that case.
21 They have that.

22 And the lawyers in that case put forward every single
23 e-mail that had any negative connotations with regard to
24 revenue and retaining customers, it's all there.

25 THE COURT: Well, if what you're telling me is that

1 that was already produced in the BMG case, that you went
2 through and did a search and produced all that information in
3 the BMG case, and that the lawyers in the BMG case had access
4 to all that information and they found those documents, why are
5 you here arguing that you don't just produce what you produced
6 in the BMG case and that's going to be responsive?

7 MR. BUCHANAN: Because we're going to have to go back
8 and do an additional search with regard to, you know, every
9 single infringer again. So --

10 THE COURT: Well, what did you produce in the BMG
11 case that you're saying is what, you know, you gave them all
12 that information in the BMG case?

13 MR. BUCHANAN: I believe the request there was for
14 similar information, and was produced. And those lawyers in
15 that case pulled out the most inflammatory, egregious types of
16 e-mail that they could find, and they put them in the trial and
17 they have all that.

18 So now we're going to have to go do this other
19 search, you know, for this period of time. And we just don't
20 think we should do that.

21 THE COURT: Why, why -- the BMG search, what was the
22 time period for the documents that were produced in the BMG
23 search?

24 MR. BUCHANAN: I'm not sure what that time period
25 was, whether it was -- I don't know if it was 2010 to -- or

1 earlier 2008 -- but I am not sure what it was. I mean, I can
2 honestly find that out.

3 I mean, if they want to articulate search terms to
4 capture -- but if you see, they have used the word
5 "termination." So how many hits are going to come up with
6 "termination"?

7 You know, "revenue," we love revenue. I mean, that
8 is just not going to produce anything. If they want to come up
9 with particular search terms to make this a narrow focussed
10 search -- but the Court, you admonished them the last time that
11 the infringement notice was too broad, don't go back to BMG and
12 plow the same ground. So they came up with a request that's
13 broader and it's more generic.

14 And so, that's what we're living with. It shouldn't
15 be on us to come back and say, okay, here are the search terms.
16 And I just -- I just think it's overly broad and burdensome and
17 we shouldn't have to do it.

18 And look, I don't know how many e-mails it's going to
19 produce, but, you know, they have e-mails from that case in
20 which a lot of documents were produced and which were searched,
21 and they have all that --

22 THE COURT: Well, they don't have all the e-mails or
23 documents that were produced in the BMG case. They have the
24 ones that the lawyers in the BMG case decided to put into the
25 public record as trial exhibits.

1 MR. BUCHANAN: And/or used in depositions.

2 THE COURT: Or used in depositions, okay.

3 MR. BUCHANAN: So I think it's a fair assumption that
4 those lawyers at that firm, Steptoe & Johnson, are excellent
5 lawyers and they would have pulled every single document to use
6 in a deposition that had any relevance to what they wanted to
7 prove with regard to our attitudes toward copyright
8 infringement at the time period in question.

9 THE COURT: All right. Mr. Zebrak, I will hear from
10 you.

11 What I'm -- I mean, this is an issue that needs to
12 get resolved, and it needs to resolved fairly quickly. Because
13 I think these documents, we need to understand what the
14 situation is and what it is that you are actually producing and
15 not producing.

16 I want to know what was actually done in the search
17 in the BMG case. What documents were actually produced in the
18 BMG case. And then an explanation as to why the results of
19 what was produced in the BMG case, that is the sum total of
20 those documents, shouldn't be produced to the plaintiffs in
21 this case.

22 MR. BUCHANAN: With regard to e-mails and
23 correspondence concerning infringement?

24 THE COURT: Infringement, that's right. I mean,
25 that's the issue that I'm addressing here because, you know,

1 the idea that it's going to be limited to only communications
2 having to do with what you define as a formal or informal
3 policy, which I don't know what that -- formal I can
4 understand. What you would designate as an informal policy is
5 too fluid for me to say that I am going to limit it to what you
6 define as an informal policy.

7 And to limit it to only documents or e-mails or
8 communications relating to the plaintiffs' infringement notices
9 is too narrow. Because if it relates to the way that we handle
10 these claims, either formally or informally, whether you deem
11 it a policy or not, is going to be relevant information.

12 And I think the time period from 2010 to 2014, which
13 I think is what was asked for; is that right, have I got that
14 right?

15 MR. BUCHANAN: Yes.

16 THE COURT: Is the relevant time period.

17 So, Mr. Zebrak, let me hear from you. If we find out
18 that what they did in the BMG case was, you know, they searched
19 for -- they tell you what it was that they did in the BMG case,
20 what they searched for and what was produced in the BMG case,
21 and then you get the production in the BMG case, coming back
22 and saying, you know, this works or this doesn't work, how does
23 that sound?

24 MR. ZEBRAK: I mean, I think that's likely to be
25 fine. We know that that search in the BMG did not include the

1 sorts of artificial limitations that they are imposing here
2 because those salacious sorts of e-mails that reflect that it's
3 -- you know, didn't include the name BMG or BMG's works.

4 So I suspect that that BMG production would be
5 sufficient. And the notion that right now we have everything,
6 to be clear, even the trial exhibits, what we have are scans of
7 printouts. Which is why, you know, what we want to do is
8 receive original electronic documents of these so that we can
9 use them at a trial, not these messy documents that -- what
10 they are attempting to do is to sterilization their activity by
11 just showing us, here is what our policy was. Not the
12 instances where we applied it and the jury can see context.

13 So I think that that BMG production would be
14 sufficient in this area. But, again, Cox's counsel today said,
15 plaintiffs should propose some search terms. That is
16 diametrically opposite to what they have been saying all along,
17 which is, we won't speak with you about search terms.

18 So, you know, they have been resisting discovery, and
19 now want to drag it out by asking us to give search terms.

20 I think Your Honor's idea of having them explain what
21 they are doing from BMG would be great and just make that
22 production.

23 THE COURT: All right. Well, give them that
24 information by Tuesday morning. Okay?

25 MR. BUCHANAN: So just to be clear, give the Court

1 that information --

2 THE COURT: No, I -- well, I mean, you know, I don't
3 want to get involved unless I have to get involved. I mean, I
4 think it's hopefully have provided at least some guidance to
5 the parties as to what I am going to, if I end up having to
6 rule on this, what the ruling is going to be.

7 What I think that, you know, I need to know
8 whether -- what it was that you did in order to do your
9 production in the BMG case. Provide that to the plaintiffs as
10 to what it was, the efforts that were taken to provide
11 responsive documents relating to these items. So we're limited
12 to that.

13 MR. BUCHANAN: Communications and e-mails
14 regarding --

15 THE COURT: Policies and procedures. You know, what
16 we're going to do with infringement and those kinds of things.

17 And then, you know, talk with them about whether that
18 BMG production would satisfy their desire for information. And
19 if so, then I think your client needs to seriously consider
20 just providing the BMG. And if it decides it doesn't want to
21 and I have to rule on that issue, I will do so.

22 But I want you all to have a further conversation as
23 to that possibly being the way to deal with this situation.
24 And, you know, I don't -- I understand your position. You
25 don't want to have to produce every single document relating to

1 every single infringement notice.

2 But you also have to understand that the way that you
3 have phrased what you're willing to do causes the plaintiff and
4 the Court some discomfort that what you're trying to do is to
5 not produce information that I think we're all aware of that is
6 out there that would be very significant information in this
7 case.

8 So, you know, I am going to go ahead and let you all
9 work on that. Get them that information about the BMG, what
10 was done in order to prepare -- get those documents -- I
11 understand you all weren't involved in that, but the client was
12 involved in it. You should have access to that information.
13 Talk to them about what that was and what the actual production
14 was.

15 And then see if whether the -- whether providing them
16 with that production relating to those types of documents would
17 satisfy this. If not, then we'll need to come back and we will
18 deal with it.

19 MR. BUCHANAN: Yes, Your Honor.

20 THE COURT: Okay. One other thing that I want to
21 talk about before we -- just is this procedure that's
22 followed -- and I am going to give you an opportunity to
23 address the sealing issues.

24 It's a little unclear to me, and I honestly haven't
25 gone back to try and -- the way that we typically do on sealing

1 is that you need to file a public version of everything that
2 you are seeking to file under seal. But the actual sealed
3 document does get filed electronically, but gets filed
4 electronically under seal.

5 I think there may be some -- that the electric --
6 that the complete version of documents have not been getting
7 filed electronically under seal, but have only been presented
8 to the Court.

9 So let's follow that procedure going forward.

10 Whoever wants to talk on behalf of Cox, you know, I
11 have got this pending motion to seal the exhibits that were to
12 the memorandum in support, which I think are exhibits starting
13 with Exhibits G through I believe O, and then two of the
14 exhibits in the reply.

15 I want to give Cox any further opportunity to say
16 what they want to say about why these documents shouldn't be
17 unsealed. I got the opposition -- or I got the response that
18 you filed, at least as to the motion to seal, Exhibits C
19 through O in the moving papers.

20 I mean, these are all -- there are no trade secrets.
21 There is no what I would term sensitive business information.
22 These are communications that have now been placed in the
23 public record through the BMG trial.

24 And I am -- these are documents that I actually
25 looked at and considered in deciding this motion. Not like in

1 the other motion where they really weren't, I didn't think,
2 necessarily significant in my dealings.

3 So help me understand why these exhibits shouldn't be
4 unsealed in this case.

5 MS. GOLINVEAUX: Yes, Your Honor. As we mentioned in
6 our filing, looking at the transcript from the BMG trial, it is
7 not clear that these were all published publicly and lost their
8 protection. And the BMG protective order specifically allowed
9 documents that were introduced during the trial to retain their
10 confidential status. And Judge O'Grady specifically made sure
11 that there were not third parties in the courtroom while
12 certain of these documents were testified about.

13 So it's not --

14 THE COURT: Which one of these documents would have
15 been -- the courtroom would have been cleared, is your
16 indication? That he cleared the courtroom at any point in time
17 in the BMG case?

18 MS. GOLINVEAUX: There are several times during the
19 transcript where there was confidential information that was
20 discussed, and Judge O'Grady made clear that there were no
21 third parties in the courtroom. And they haven't -- it's not
22 clear that these specific documents were published up on the
23 screen during the trial such that they would have lost their
24 confidential status, Your Honor.

25 THE COURT: Why would -- why would a trial exhibit

1 have to be put on a screen if it is admitted into evidence in a
2 trial in a case to lose its public, to lose its
3 confidentiality? I mean, I don't understand that.

4 MS. GOLINVEAUX: Your Honor, the mere fact that it
5 was used at the trial would not take away the confidential
6 status of the document. And it's not clear that they were in
7 the public record. And the plaintiffs haven't indicated that
8 that's the case. So they would retain their confidential
9 status.

10 THE COURT: Well --

11 MS. GOLINVEAUX: And these documents specifically
12 discuss internal policies with respect to processing notices
13 that are confidential and not public.

14 THE COURT: These are policies that are now five
15 years old.

16 MS. GOLINVEAUX: Yes, Your Honor.

17 THE COURT: And help me understand why these kinds of
18 e-mails should be -- even putting aside the fact that they were
19 trial exhibits in court, why any one of these exhibits, and you
20 can go through them and try and point out that are all dated
21 back in 2014 or earlier for the most part, should be considered
22 confidential at this stage.

23 MS. GOLINVEAUX: Your Honor, making public
24 information about the termination policy and when users and
25 subscribers are being terminated, for example, is not something

1 that Cox would do because it would -- it could allow users, if
2 you will, to kind of cook the system or work around it.

3 THE COURT: Well, that information was clearly made
4 public in the BMG trial.

5 MS. GOLINVEAUX: Well, and we didn't --

6 THE COURT: There was testimony for hours about what
7 Cox did and didn't do as far as termination, and what its
8 policies were and weren't. So that one -- that ship has sailed
9 long ago.

10 MS. GOLINVEAUX: And, Your Honor, we did not seek in
11 our briefing to maintain the confidentiality for certain of the
12 information, for example, that they put in their opposition
13 brief. It's for the underlying documents that they attached to
14 the Gould declaration.

15 THE COURT: All right. Anything else as to why you
16 think any of these documents should remain under seal?

17 MS. GOLINVEAUX: No, Your Honor, that's it.

18 THE COURT: Okay. All right.

19 Well, I will review that, but I plan to -- I will
20 wait to get the response to the other motion to seal before I
21 rule on that one, but I will probably rule on the first motion
22 to seal in the next few days.

23 MR. GOULD: Your Honor, if I might, on the motion to
24 seal?

25 THE COURT: Sure.

1 MR. GOULD: Jeff Gould, Your Honor, for the
2 plaintiffs. So I just want to touch on a couple of things.

3 First, we apologize for having to burden Your Honor
4 with so many seal motions. We think they are unnecessary and
5 shouldn't be there in the first place.

6 Secondly, as to the specific issue, I think you hit
7 the nail on the head. That although it's our motion, clearly
8 we don't think that the seal is warranted here.

9 THE COURT: Right.

10 MR. GOULD: We will follow the rules and have
11 complied with the protective order.

12 But you hit the nail on the head in asking why they
13 think that these should be sealed. And the burden is on them
14 squarely to establish that it has.

15 So to come in with a paper and say, the record is
16 unclear whether those were publicly aired or whether anyone was
17 in the court, doesn't come close to meeting that standard.

18 More fundamentally, we're concerned that this is
19 going to be an issue that we and you're going to have to deal
20 with again and again and again.

21 So to the extent that you are ruling on this one
22 could provide some guidance to the parties, I think that would
23 be extremely helpful.

24 THE COURT: Well, thank you.

25 All right. Anything else in this case today?

1 MR. BUCHANAN: No, Your Honor.

2 MR. ZEBRAK: No, Your Honor.

3 THE COURT: Okay. Well, thank you. Court will be
4 adjourned until 2 o'clock.

5 NOTE: The hearing concluded at 11:12 a.m.

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9 C E R T I F I C A T E o f T R A N S C R I P T I O N

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11 I hereby certify that the foregoing is a true and
12 accurate transcript that was typed by me from the recording
13 provided by the court. Any errors or omissions are due to the
14 inability of the undersigned to hear or understand said
15 recording.

16

17 Further, that I am neither counsel for, related to,
18 nor employed by any of the parties to the above-styled action,
19 and that I am not financially or otherwise interested in the
20 outcome of the above-styled action.

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24

25

/s/ Norman B. Linnell
Norman B. Linnell
Court Reporter - USDC/EDVA